

REMARKS

Claims 1-9, 11-23, and 25-33 are pending in this RCE application. Claims 1-9, 11-23, and 25-33 were rejected under 35 U.S.C. §103 in the Office Action of April 12, 2007 in the parent case. Applicants address these rejections in the Preliminary Amendment. Based on the foregoing amendments, and the following remarks, Applicants hereby respectfully request allowance of claims 1-9, 11-23, and 25-33 pending in the RCE application.

Applicants have amended independent claims 1, 12, 13, and 14 to specifically require that the edible spread composition has a density greater than about 1.05 g/ml. Support for this amendment can be found in original claims 10 and 24 (as well as elsewhere in the specification).

I. Claim Rejections under 35 U.S.C. §103

Claims 1, 4-11, 14-18, 21, 24, and 25 have been rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent 3,366,494 issued to Bower et al. (hereinafter "Bower"). Claims 2, 3, 9, 12, 13, 19, 20, 22, and 23 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Bower, and further in view of U.S. Patent No. 2,883,286 issued to Musser. Claims 26-33 are rejected under 35 U.S.C. §103(a) as being unpatentable over Bower in view of Musser as applied to claims 1-25 above, and further in view of a Food Engineering Article (hereinafter "Article").

A. Rejection of Claims 1, 4-11, 14-18, 21, 24 and 25

Claims 1, 4-11, 14-18, 21, 24, and 25 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Bower. Applicants' invention is not rendered obvious over Bower. Applicants respectfully traverse the rejection. Bower does not disclose each and every limitation of the rejected claims as written.

As stated in the previous office action response, the cited reference (Bower) does not disclose or suggest an edible spread composition having 10-45% plant fiber-containing material, 0.5-10% edible oil, 10-60% water and an emulsifier, as called for in independent claims 1 and 14. The emulsifier may further be present in an amount from 0.05-2%. The edible spread composition may then be packaged in a container under

positive pressure, and stored for an amount of time and dispensed without oil separation. Moreover, based on the present amendments, all independent claims specifically require that the edible spread composition has a density of greater than about 1.05 g/ml.

Bower, on the other hand, provides pressurized aerosol food emulsions -- i.e., foams -- that are comprised of the combination of a water-based fluid foodstuff and an emulsion, where the emulsion comprises 15-80% aqueous phase, 20-75% edible oil, and 0.1-12% emulsifier. The emulsion is added to the water-based foodstuff in amounts of from 10-40% by weight, thus the remainder comprises the foodstuff (i.e., 60-90%). The aerosol package dispenses the foodstuff in a foam form.

As noted, the present invention provides an edible spread composition whereas Bower relates to a foam composition. These terms are used in the art to denote very different types of compositions. As noted in the present specification, the edible spreads of the present invention generally have densities of greater than about 1.05 g/ml and preferably about 1.15 to 1.3 g/ml. As one skilled in the art would understand, foams such as those disclosed in Bower would be expected to have densities less than 1 g/ml (and generally much less than 1 g/ml). A foam can even be defined as a colloidal suspension of a gas in a liquid (see Online Chemistry dictionary, www.chemistry-dictionary.com), which is quite different from a spread. Moreover, one of ordinary skill in the art would not expect that teachings regarding forming foams would be especially relevant to the problem of preparing an edible spread containing an oil that is resistant to oil separation. Applicants have amended each of the independent claims 1, 12, 13, and 14 to specifically require that the edible spread composition has a density of greater than about 1.05 g/ml.

Examiner argues that the foam of Bower can also function as a spread. However, the definition of a foam and a spread is quite different and it is clear that one does not function as the other. Although Examiner seems to recognize that the foam and the spread do have different densities, Examiner further states that these differences do not yield unobvious results. (See Office Action ("OA"), page 2). However, that is quite to the contrary. Bower states that its main food ingredient (the water-based foodstuff) must have sufficient fluidity (see Col. 1, line 72 to Col. 2, line 1) to provide an adequate foam product. A product with a greater density may not be fluid enough. Additionally, Bower states that its product should have a viscosity of 1 to 1500 centistokes (cSt) (see Col. 2, lines 4-5);

whereas, for comparison, a mayonnaise composition typically has a viscosity of about 6250 cSt, where a mayonnaise can be similar to a spread (see www.engineeringtoolbox.com, "Dynamic, Absolute, and Kinematic Viscosity.").

Moreover, common sense clearly would indicate that a "spread" and a "foam" are very different and the characteristics required for one would likely be unrelated to the other. For example, assuming a peanut nut-like foam could be prepared, such a product would provide limited, if any, guidance to the preparation of a peanut butter composition (i.e., edible spread) which would be resistant to oil separation when stored in a pressurized container.

The food emulsion of Bower comprises the combination of a water-based fluid foodstuff and an emulsion. Bower defines a water-based fluid foodstuff as a solution, dispersion or emulsion of other materials in water. Bower also discloses adding the food material (i.e., the main food ingredient) in an amount that is from 60-90%; Applicants' main food ingredient (i.e., the plant-fiber containing material) is added in amounts from only 10-45%, well below Bower's range.

Examiner additionally references Example 1 of Bower which discloses a whipped fruit mixture prepared with a raspberry fruit puree as the main food ingredient and an emulsion, where the emulsion includes a cellulose-based emulsifier. Examiner argues that the cellulose used as an emulsifier can serve dual functions, which may sometimes be the case, but even if the cellulose is considered as a fiber-containing material, or main food ingredient, it is in an amount far less than that disclosed in Applicants' invention (i.e., 10-45%)¹. Examiner attempts to overcome this deficiency by stating that the combination of the fruit puree and the cellulose would provide the necessary amount of fiber that Applicants disclose. However, Applicants' plant fiber-containing material only requires a single source of fiber-containing material, not a dual source that is the result of a combination of the emulsifier of the emulsion with the main food ingredient, as in Bower.

Furthermore, the amount of the main food ingredient in Example 1, if equated to the plant fiber-containing material of Applicants' invention, is too high (i.e., 74%) compared to

¹ The cellulose is in an amount of less than or equal to 4.8%. For example, assuming a total emulsion amount of 100 kg, if 12% microcrystalline cellulose is used in the emulsion, then 12 kg would be needed of microcrystalline cellulose for the emulsion. If 40% (the greater of the amounts) of the emulsion is added to the final product, then 12 kg microcrystalline cellulose x 0.40 = 4.8 kg microcrystalline cellulose in the final product, or 4.8% ((4.8kg/100kg total final product) x 100% = 4.8%).

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the amounts used in Applicants' disclosure (i.e., 10-45%). Applicants disclose only 10-45% fiber-containing material, and Bower discloses at least 74% in Example 1, and potentially even higher if the cellulose amount is combined with that. Examiner seems to believe that Applicants are arguing that the raspberry puree would have too much fiber in it, and Examiner attempts to argue against this by stating that the raspberry puree also contains water (*see* OA, pages 2-3) and therefore the actual fiber amount would be lower than 74%. However, Applicants do not specify a "fiber" amount in their disclosure, rather they are only specifying the amount of the fiber-containing food item. Therefore, the fiber-containing food in Bower, as that amount would be defined in the present invention, must be at least 74% in Example 1 (and greater if Examiner combines the amount of cellulose used as an emulsifier), compared to the Applicants' fiber-containing food amount of 10-45%. As stated in the previous office action response, there is no motivation to adjust the amount of the raspberry puree (if being defined as the fiber-containing material) in a downward direction.

Examiner states that Bower provides a selection of examples that encourage product modification. Bower, however, clearly states and claims that its main food component (which Examiner would like to equate to our plant fiber-containing material) is in an amount of 60-90% and does not encourage modifying that amount. (*See* Bower, Col 1, lines 44-46: where 10-40% of the emulsion is added to the water-based food, therefore translating to 60-90% of the main ingredient to equal a total amount of 100%.).

Therefore, it is clearly evident that Applicants' invention is not obvious in light of Bower, for at least the reasons stated above. Bower's range of the main food component, if equated to Applicants' fiber-containing material, is clearly out of the range specified by Applicants and furthermore there is no motivation to modify that range to a lower amount.

Thus, independent claims 1 and 14, and dependent claims 4-9, 11, 15-18, 21, and 25 that depend therefrom, are therefore allowable for the reasons discussed above. Applicants respectfully submit that the cited reference does not disclose or suggest the invention as claimed in claims 1, 4-9, 11, 14-18, 21, and 25, nor are these claims rendered obvious over Bower. Applicants respectfully request reconsideration and allowance of these claims.

B. Rejection of Claims 2, 3, 9, 12, 13, 19, 20, 22 and 23

Claims 2, 3, 9, 12, 13, 19, 20, 22, and 23 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Bower in view of Musser. Applicants respectfully traverse this rejection because Applicants' invention is not rendered obvious by Bower nor Musser taken alone or together. There is no motivation to combine these references, and even if combined, the references still do not disclose, describe, or suggest Applicants' invention. As shown above, Applicants' invention is not obvious in view of Bower. The arguments regarding Bower are hereby incorporated by reference. Musser does not correct these and other deficiencies in Bower to render Applicants' invention obvious.

First, it must be noted that Musser, like Bower, relates to a foam product. As discussed above, one of ordinary skill would expect a foam product to have a density less than 1 g/ml (and most likely much less than 1 g/ml). Musser utilizes a higher level of sugar (i.e., sweetener) than does Applicants' invention. Musser requires anywhere from 20 to 40% sugar, whereas Applicants' invention uses much less, from 5 to 20%. Furthermore, it would not be obvious to combine the invention of Musser with that of Bower because Musser discloses using chocolate, sugar and dairy for very different reasons than in Bower, and Musser even teaches away from such a combination, as explained in more detail below.

Musser states that the purpose of its chocolate foam is to stiffen after dispensing so that it stiffens and appreciably sets after coated on a dessert (see Col. 1, lines 26-28). Musser further recognizes that "the remarkable feature[s] of the product of the invention is that it tends to stiffen after it is dispensed." (See Col. 6, lines 72-73). Furthermore, to provide these desired features the milk is used to aid in the foaming and the sugar is used to contribute to the body and stiffness of the chocolate. (See Col. 6, lines 70-71). Therefore, Musser teaches against combining its invention, which teaches stiffness upon dispensing, with that of Bower, which clearly requires soft, whipped toppings upon dispensing that do not harden (see Bower examples, beginning at Col. 3, lines 49).

Additionally, it is not obvious to combine a patent discussing chocolate foam that stiffens and hardens (i.e., Musser) with a water-based foodstuff emulsion forming a foam (i.e., Bower) to obtain a peanut spread, since it is not a desirable trait to have hardened and stiff peanut butter after dispensing.

Thus, Applicants respectfully submit that claims 2, 3, 9, 12, 13, 19, 20, 22, and 23 are not rendered obvious over Bower alone or in combination with Musser. Applicants respectfully request that this rejection be withdrawn.

C. Rejection of Claims 26-33

Claims 26-33 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Bower and Musser and further in view of the Food Engineering Article. Applicants respectfully traverse this rejection because as stated above, Applicants' invention is not obvious in view of Bower, either alone or in combination with Musser. The arguments regarding Bower and Musser are hereby incorporated by reference. The Article does not correct these and other deficiencies in Bower and/or Musser to make Applicants' invention obvious.

The Article does not disclose any details about the features of an aerosol or piston type container. Even if a similar type container were disclosed in the Article, which it is not, claims 26-33 depend from independent claim 14 which further requires using the container with a certain type of food product, the edible spread composition, with the specific ingredient amounts claimed therein. Even if the container in the Article was the same as Applicants (which it is not), the present claims would still be non-obvious since none of the above-mentioned references discloses a similar composition product, either alone or if combined.

Thus, Applicants respectfully submit that claims 26-33 are not rendered obvious over Bower alone or in combination with Musser and/or the Article. Applicants respectfully request that this rejection be withdrawn.

CONCLUSION

In view of the foregoing, Applicants submit that claims 1-9, 11-23 and 25-33 are patentable over the cited references and hereby respectfully request reconsideration and allowance of claims 1-9, 11-23 and 25-33.

The Commissioner is hereby authorized to charge any additional fees which may be required in this application to Deposit Account No. 06-1135.

Respectfully submitted,

FITCH, EVEN, TABIN & FLANNERY

Date: September 11, 2007

/Nada J. Ardeleanu/
Nada J. Ardeleanu
Registration No. 54,965

FITCH, EVEN, TABIN & FLANNERY
120 South LaSalle Street
Suite 1600
Chicago, Illinois 60603-3406
Telephone: 312.577.7000
Facsimile: 312.577.7007